No. 198

In the Supreme Court of the United States

OCTOBER TERM, 1960

MAURO JOHN MONTANA, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 4a–9a) is reported at 278 F. 2d 68.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1960. A petition for rehearing was denied on May 26, 1960. The petition for a writ of certiorari was filed on June 29, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, who was born in Italy in 1906 of a citizen mother and an alien father, was a citizen

of the United States at birth, or became a citizen on his mother's return to the United States.

STATUTES INVOLVED

R.S. 2172 (1878 ed.), which is substantially the Act of April 14, 1802, 2 Stat. 153, Section 4, provided in pertinent part:

> The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; * * *.

R.S. 1993 (1878 ed.), which is substantially the Act of February 10, 1855, 10 Stat. 604, Section 1, provided:

> All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

STATEMENT

Petitioner was ordered deported by the Immigration and Naturalization Service after a hearing. He

then brought this action in the United States District Court for the Northern District of Illinois seeking a judgment declaring him to be a national of the United States (R. 6–12). The pertinent facts are as follows:

Petitioner was born in Italy on June 26, 1906, of an alien father and a citizen mother (R. 7, 8). His parents, who had lived in the United States, had arrived in Italy in February 1906 (R. 22). His father returned to the United States in April 1906 and his mother returned with petitioner in September 1906 (R. 25, 27). Petitioner's mother testified at the trial that before petitioner was born she tried to get a United States passport to return to the United States, but the American Consul refused to issue the passport because she was pregnant (R. 22–23). She obtained the passport with no difficulty after petitioner was born (R. 25). She also testified that she and her husband did not live together for about three months after she returned to the United States in 1906 but that thereafter they became reconciled. They continued to live together up to the time of trial (R. 25–26, 28–29).

The district court found that under the applicable statute, R.S. 1993, *supra*, petitioner had not acquired United States citizenship at birth, since his father was an alien (R. 38–40). The court of appeals affirmed.

ARGUMENT

1. Petitioner claims (Pet. 8–13) that he became a citizen when born abroad of an American citizen mother and alien father under R.S. 2172, *supra*,

p. 2. It is clear, however, that petitioner's reliance on R.S. 2172 is misplaced.

R.S. 2172 was an almost verbatim reenactment of the second clause of Section 4 of the Act of April 14, 1802, 2 Stat. 155, which had provided:

> * * * the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: *Provided,* that the right of citizenship shall not descend to persons whose fathers have never resided within the United States * * *.

The Act of 1802 had been found to be defective in that it granted citizenship only to those foreign-born children whose parents were citizens on or before April 14, 1802.[1] Therefore, Congress in 1855 passed legislation (10 Stat. 604) to grant citizenship rights to children whose fathers were citizens at the time of their birth,[2] and this provision was made retroactive as well as prospective in operation. See 32 Cong. Globe 170–171; *Weedin* v. *Chin Bow,* 274 U.S. 657, 663–664; *United States* v. *Wong Kim Ark,* 169 U.S. 649, 674. But this statute, which later became R.S. 1993, *supra,* p. 2, clearly did not bestow citizenship on children born of an alien father even though the mother was a citizen. In fact, Congressman Cutting,

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[1] See 2 American Law Register 193. Considering congressional recognition of the views of Mr. Horace Binney there expressed, it is now too late to argue that Mr. Binney was wrong.

[2] The statute further required that the *father* reside in this country at some time prior to his child's birth. See *Weedin* v. *Chin Bow,* 274 U.S. 657.

who proposed the 1855 legislation, specifically pointed out this limiting feature during debate (32 Cong. Globe 170, 33rd Cong., 1st Sess.):[3]

> "In the reign of Victoria, in the year 1844, the English parliament provided that the children of English mothers, though married to foreigners, should have the rights and privileges of English subjects, though born out of allegiance. *I have not, in this bill, gone to that extent, as the House will have observed from the reading of it.* [Emphasis added.]

The limitation to fathers has been recognized by this Court (*Weedin* v. *Chin Bow*, 274 U.S. 657), by commentators (3 Hackworth, *Digest of International Law*, § 222, pp. 17–23 (1942)), and by Congress when it made a change in the statute in 1934 (48 Stat. 797) to provide for United States citizenship for children thereafter born outside the United States whose father *or mother* was an American citizen. See H. Rep. No. 131, 73rd Cong., 1st Sess.; S. Rep. No. 865, 73rd Cong., 2d Sess.

The reason for the inclusion of the second clause of Section 4 of the Act of 1802 in the Revised Statutes (R.S. 2172) is somewhat puzzling.[4] But, as applied to

[3] The bill was adopted, substantially as introduced, in the second session of the 33rd Congress. See 36 Cong. Globe 91–92, 116, 632, 644, 651.

[4] Perhaps, the explanation is that Congress intended to carry over only the first clause of Section 4 of the 1802 Act, which dealt with the citizenship of minor children deriving from their parents' naturalization—a subject not touched by the Act of 1855—and by inadvertence carried over the second clause as well. This explanation seems most plausible in light of the fact that R.S. 2172 came under the heading "Naturalization" in the Revised

petitioner, who was born in 1906, there is no conflict between R.S. 1993 and 2172. Whether "now" if used alone in R.S. 2172 would have been capable of prospective application (see Pet. 10), the whole phrase used in R.S. 2172, "persons who now are, or have been, citizens" has no prospective implication. Particularly is this so when that language is contrasted with the language of R.S. 1993 referring to children "heretofore born or hereafter born" whose fathers "were or may be at the time of their birth" citizens. Congress knew how to make a statute prospective when it intended to do so. And if there were a conflict between R.S. 2172, derived from the Act of 1802, and R.S. 1993, derived from the Act of 1855, the Act of 1855 would control. See *Stephan* v. *United States*, 319 U.S. 423, 426; *Posadas* v. *National City Bank*, 296 U.S. 497, 503–505; *Red Rock* v. *Henry*, 106 U.S. 596, 602. Furthermore, even if R.S. 2172 could be considered as governing, its language would seem to require that *both* parents be citizens of the United States.[5]

In sum, the history shows that in 1855 Congress thought that it was granting greater rights than had

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Statutes, while R.S. 1993 came under the heading "Citizenship." Or, as the court of appeals suggested (Pet. 8a), the second clause may have been enacted either to apply to persons born between 1802 and 1855 or to save rights of citizenship arising before 1802.

[5] In 2 Kent, *Commentaries*, pp. 51–53 (5th ed., 1844), it is suggested that the clause in the original 1802 statute requiring that the *father* should have resided in the United States indicated that the statute should be properly construed to permit derivative citizenship through the father regardless of the nationality of the mother. No suggestion was made that the nationality of the mother alone would govern.

theretofore existed by permitting citizenship to be acquired from the father alone. 32 Cong. Globe 170. Thus, the courts which have had the question before them have, in accord with the opinion below, ruled that the citizenship of a child born abroad between 1855 and 1934 is determined by R.S. 1993, not R.S. 2172. *Ying* v. *Cahill*, 81 F. 2d 940 (C.A. 9); *D'Alessio* v. *Lehman*, 183 F. Supp. 345 (N.D. Ohio).

2. Alternatively, petitioner argues (Pet. 14–18) that, when his mother returned to the United States in September 1906, she "resumed" American citizenship and that he became a citizen through her by virtue of such "resumption." In 1907 Congress provided that a United States citizen who married a foreigner shall take the nationality of her husband but that at the termination of the marital relationship she could "resume" her American citizenship. Act of March 2, 1907, 34 Stat. 1228. At that time, Congress also provided that a minor child born outside the United States of alien parents who was or came to the United States during minority should be deemed a United States citizen "by virtue of the naturalization of or resumption of American citizenship by the parent." That citizenship of a child could come through the mother was made explicit by the Act of May 24, 1934, 48 Stat. 797.[6] Both acts, however, were generally interpreted as permitting citizenship through a mother only when she had legal

[6] In 1922, Congress provided that a female United States citizen who married an alien did not lose her citizenship by the marriage, and made provision for expeditious reacquisition of citizenship by women who had previously lost their United States nationality. Act of September 22, 1922, 42 Stat. 1021.

or practical custody of a minor child, a requirement which was made express in the 1940 and 1952 Acts. See *Kletter* v. *Dulles*, 111 F. Supp. 593, 597–598 (D. D.C.), affirmed, 268 F. 2d 582 (C.A. D.C.), certiorari denied, 361 U.S. 936.

Neither the 1907 Act nor the 1934 Act has any relevance to this case. First, petitioner's mother never lost her United States citizenship[7] (her marriage to an alien having taken place before 1907) so that she never had occasion either to be naturalized or to resume United States nationality. Second, even if petitioner's mother somehow lost her nationality in 1906, her return occurred in 1906 before the 1907 Act allowing resumption of citizenship was passed.[8]

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[7] Although prior to the adoption of the Act of 1907, there was a conflict in court decisions as to whether an American woman lost her citizenship solely by marriage to a foreigner (compare *In re Page*, 12 F. 2d 135, 136 (S.D. Cal.), with *Petition of Zogbaum*, 32 F. 2d 911, 912 (D. S.D.)), the better reasoned cases held that loss of citizenship did not occur solely because of marriage to a foreigner, but would result only by marriage to a foreigner accompanied by a change of domicile. The theory was that, by such a marriage coupled with change in domicile, the American woman acted to "adopt the nationality of her husband." *In re Lynch*, 31 F. 2d 762 (S.D. Cal.); see, *e.g.*, *In Re Wright*, 19 F. Supp. 224 (E.D. Pa.); *In re Fitzroy*, 4 F. 2d 541 (D. Mass.); *Ruckgaber* v. *Moore*, 104 Fed. 947 (E.D. N.Y.), affirmed, 114 Fed. 1020 (C.A. 2). The trip of petitioner's mother to Europe for only seven months did not constitute a change of domicile.

[8] Thus, if the mother had lost her citizenship, both parents were aliens when petitioner was born abroad. Petitioner would then have to rely on the first clause of R.S. 2172 which speaks of "children of persons who have been duly naturalized under any law of the United States." Not only was petitioner's mother not naturalized under any law, but, as discussed above, "persons" seems to require naturalization of both parents.

Moreover, the 1907 Act allows resumption of citizenship only upon "the termination of the marriage relation"—which has never occurred here. Third, when the 1934 Act was passed, allowing a minor child to acquire citizenship through naturalization or resumption of citizenship of the mother, petitioner was twenty-nine years old. And, finally, the mother's testimony that she had quarreled with her husband and lived apart from him for three months does not show that the mother had legal custody of petitioner. Indeed, the record of arrival showed that petitioner was destined to his father (R. 37).

The short of the matter is that, at petitioner's birth, Congress had not provided for United States nationality for children born abroad of a United States citizen mother and an alien father. Petitioner was born abroad of an alien father and was an alien when he entered this country. Since his father never became naturalized during petitioner's minority, petitioner remained an alien.

3. Petitioner claims (Pet. 19–20) that his mother was prohibited from bearing him in the United States by the refusal of an American consul to issue her a passport before his birth. But in 1906 an American passport was not a necessary document for United States citizens wishing to come to the United States. The requirement of a passport as an entry document was not imposed until the Act of May 22, 1918, 40 Stat. 559.

The mother's story, moreover, has the ring of incredibility. It seems unlikely that she would have left the United States without a passport and then

sought to obtain one in Italy. If she had a passport when she left, it would have been unnecessary for her to obtain a passport abroad since such a passport was then valid, without renewal, for one year. R.S. 4075.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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